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9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON  
11 AT SEATTLE

11 JOHN MERRELL,

12 Plaintiff,

13 v.

14 NOREEN RENIER,

15 Defendant.  
16

CASE NO. C06-404JLR

ORDER

17  
18 **I. INTRODUCTION**

19 Before the court is Plaintiff's motion for attorney's fees and costs (Dkt. # 60). For  
20 the following reasons, the court GRANTS the motion and awards costs in the amount of  
21 \$1,133.12 and fees in the amount of \$38,425.

22 **II. BACKGROUND**

23 The facts giving rise to this dispute are set forth in the court's November 16, 2006  
24 order (Dkt. # 39) ("November Order"). The court will repeat only those facts necessary  
25 to the instant motion.  
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1 In an effort to settle long-standing legal disputes and personal differences, the  
2 parties entered into a Settlement Agreement over 15 years ago. Settlement Agreement at  
3 3.<sup>1</sup> The parties agreed to “no longer be involved in each other’s lives in any way,” and to  
4 not engage in any activity that would “diminish and/or disparage the other’s reputation.”  
5 Id. at 2. The agreement further provides that “in the event of breach, any party breaching  
6 said agreement agrees to pay the non-breaching party’s attorney’s fees and costs for  
7 enforcement of the agreement . . . .” Id.

8 More than ten years after entering into the Settlement Agreement, Defendant  
9 published a book wherein she discusses her dispute with Plaintiff in a less than flattering  
10 manner and accuses him of telling repeated lies regarding their dispute. When Plaintiff  
11 learned of the book, he sued Defendant for breaching the Settlement Agreement by  
12 disparaging him. Plaintiff also sought the equitable remedy of disgorgement of  
13 Defendant’s book profits. Defendant responded with three counterclaims. She claimed  
14 that Plaintiff breached the confidentiality clause in the Settlement Agreement by  
15 divulging the agreement to her publisher. She also claimed that on that basis, Plaintiff  
16 tortiously interfered with her publishing contract and with business expectancies  
17 associated with the ongoing publication of her book.

18 In November 2006, the court ruled on the parties’ cross-motions for summary  
19 judgment. In the November Order, the court held that Defendant breached the Settlement  
20 Agreement by publishing her book, but dismissed Plaintiff’s equitable claim for  
21 disgorgement of Defendant’s profits. The court further held that Plaintiff had no  
22 evidence of any out-of-pocket losses and thus his damage claim was limited to nominal  
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25 <sup>1</sup>The court notes that Plaintiff failed to attach the Settlement Agreement to his fee  
26 petition, which is the sole support for his claim for attorney’s fees and costs. The court  
27 therefore relies on the copy of the Settlement Agreement submitted with Plaintiff’s motion for  
summary judgment (Dkt. # 20).

1 damages. For various reasons, the court also dismissed all of Defendant's counterclaims.  
2 Plaintiff now moves for an order awarding him his attorney's fees and costs as the  
3 prevailing party in this case.

### 4 **III. ANALYSIS**

5 The Settlement Agreement provides for attorney's fees and costs to the non-  
6 breaching party when there has been a breach of the agreement. Unlike the typical fee-  
7 shifting agreements, there is no limitation set forth in the agreement requiring that the  
8 non-breaching party be the "prevailing party" in order to recover fees and costs.  
9 Defendant argues that Plaintiff is not entitled to his fees and costs because he was not the  
10 "prevailing party," as that term is defined by Washington law.

#### 11 **A. Plaintiff is The Prevailing Party.**

12 Although the parties separately agreed to pay the attorney's fees and costs of the  
13 non-breaching party, their agreement is governed by the state statute permitting such fee-  
14 shifting agreements. In this case, the court looks to Washington law to analyze whether,  
15 and to what extent, Plaintiff is entitled to his fees and costs. In Washington, litigants who  
16 contract for attorney's fees and costs must first show that they are in fact the "prevailing  
17 party."<sup>2</sup> Section 4.84.330 of the Revised Code of Washington, provides that the  
18 prevailing party in a contract dispute "shall be" entitled to reasonable attorney's fees and  
19 costs, if the contract in dispute specifically provides for the award of fees and costs.  
20 RCW § 4.84.330. The statute defines "prevailing party" as "the party in whose favor  
21 final judgment is rendered." Id.

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25 <sup>2</sup>In its November Order, the court engaged in a choice-of-law analysis and determined  
26 that Washington law governs the parties' Settlement Agreement. The court does not reiterate  
27 that analysis here, but notes that neither party disputes the application of Washington law, nor  
do they cite any other state's law in support of their arguments.

1 Defendant claims to be the prevailing party in this dispute because (1) Plaintiff  
2 initially sued four defendants, three of which were dismissed early on in the case, (2) the  
3 court rejected, or Plaintiff waived, all damages arising out of Defendant's breach, and (3)  
4 the court dismissed Plaintiff's claim for disgorgement of profits. Thus, Defendant argues  
5 that Plaintiff did not prevail in the lawsuit.

6 In Washington, the prevailing party is the one in a lawsuit who receives a  
7 judgment in his favor. See Am. Fed. Sav. & Loan Ass'n v. McCaffrey, 728 P.2d 155,  
8 164 (Wash. 1986). Even if the plaintiff does not recover damages in the amount  
9 originally sought, if judgment is entered in his or her favor, the plaintiff is considered the  
10 prevailing party. See Silverdale Hotel v. Lomas & Nettleton Co., 677 P.2d 773, 781  
11 (Wash. Ct. App. 1984) ("A party need not recover its entire claim in order to be  
12 considered the prevailing party.") (citations omitted).

13 Defendant correctly points out that Plaintiff's original Complaint in this matter  
14 asserts a breach of contract claim not only against Defendant, but also her publisher, co-  
15 author, and editor. Compl. at 1 (Dkt. # 6). Early on in the litigation, the state court, in  
16 which this matter was originally filed, dismissed all claims against Defendant's  
17 publisher, co-author, and editor. The state court did not give any reasons for its  
18 dismissal of the three defendants. From the record before this court, however, the court  
19 can surmise that the publisher, co-author, and editor were dismissed because they were  
20 not parties to the Settlement Agreement, as argued in their moving briefs. By suing  
21 these additional defendants for breach of the Settlement Agreement, Plaintiff reached  
22 beyond the logical boundaries of the class of persons liable for breach. Nevertheless,  
23 Plaintiff's overreaching does not preclude his recovery as the prevailing party vis-a-vis  
24 the remaining Defendant. It does, however, justify limiting Plaintiff's recovery to  
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1 exclude fees and costs associated with bringing suit against Defendant's publisher, co-  
2 author, and editor.

3 Defendant's remaining two arguments relate to whether the "prevailing party"  
4 analysis necessarily requires a comparison of damages claimed versus damages  
5 awarded. Defendant contends that Plaintiff cannot recover his fees and costs because  
6 he did not recover any appreciable damages and that his claim for disgorgement of  
7 profits was summarily dismissed by the court. As stated above, in Washington, a party  
8 need not recover his entire claim to be considered the prevailing party. See Silverdale  
9 Hotel, 677 P.2d at 781.

10 Plaintiff brought one cause of action against Defendant: breach of contract. As a  
11 remedy for her breach, Plaintiff sought disgorgement of Defendant's profits from  
12 publishing a book that disparaged him. The court held in its November Order that  
13 Plaintiff could not recover profits because the disparaging statements made up only a  
14 fraction of Defendant's book and Plaintiff failed to come forth with any evidence that  
15 the statements had any effect on the marketability or popularity of the book. Defendant  
16 now contends that the disgorgement of profits claim was a separate claim by Plaintiff  
17 and his failure to recover on this claim exempts him from prevailing party status.

18 Defendant cites no authority for the proposition that the prevailing party must  
19 succeed on all claims and recover some damages in order to collect fees and costs. The  
20 purpose of the underlying agreement in this case was to protect the reputation of the  
21 parties and to preclude one party from disparaging the other. Here, the court found that  
22 Defendant indeed breached the Settlement Agreement by publishing a book that  
23 impinged upon Plaintiff's reputation. The fact that Plaintiff is unable to quantify his  
24 damages does not preclude his claim or his status as the prevailing party. See Ford v.  
25 Trendwest Resorts, Inc., 43 P.3d 1223, 1229 (Wash. 2002) (noting that nominal  
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1 damages are appropriate “where, from the nature of the case, some injury has been  
2 done, the amount of which the proofs fail entirely to show”).

3 The gravamen of Plaintiff’s lawsuit was breach of contract; Plaintiff prevailed on  
4 this claim. Defendant, on the other hand, failed to prevail on any of her counterclaims.  
5 Accordingly, the court finds Plaintiff is the prevailing party and is entitled to the  
6 reasonable fees and costs associated with prosecuting his claim for breach of contract.

7 **B. The Court Awards Plaintiff Costs in The Amount of \$1,133.12.**

8 Plaintiff requests costs in the amount of \$1,611.62. Defendant claims that most  
9 of Plaintiff’s costs are not recoverable, citing the federal taxation of cost statute. See 28  
10 U.S.C. § 1920. In support of this argument, Defendant cites to federal cases in other  
11 circuits. While the court agrees that the taxation of cost in a federal suit is governed by  
12 section 1920, it does not agree that a parties’ agreement to pay costs in a contract  
13 dispute is governed by the federal taxation of cost statute and its accompanying cost  
14 exclusions. The costs in this matter were \$1,611.62. The court finds that this amount  
15 encompasses charges that the parties could reasonably have expected during litigation  
16 and are therefore costs the parties’ agreed to pay. As stated above, however, the court  
17 reduces Plaintiff’s costs attributable to the unsuccessful claims against Defendant’s  
18 publisher, co-author, and editor. The court finds that \$478.50 is appropriately  
19 attributable to these failed claims and reduces its award of costs by this amount.

20 **C. The Court Awards Plaintiff Attorney’s Fees in The Amount of \$38,425.**

21 The court has reviewed the billing records for Plaintiff’s attorney, Ross Radley,  
22 and except as mentioned below, finds the time expended and amounts charged to be  
23 reasonable and therefore recoverable. The court notes that Mr. Radley failed to attach  
24 his billing statements to a declaration attesting to their authenticity, which gave the  
25 court some pause. Defendant, however, was apparently not equally concerned, as she  
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1 did not object to their authenticity or their admissibility. Accordingly, the court  
2 considers the records as filed.

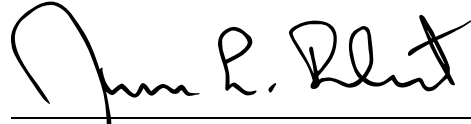
3 Plaintiff requests attorney's fees in the amount of \$48,000. The court awards  
4 Plaintiff \$38,425 in attorney's fees. This accounts for two deductions. First, as  
5 discussed above, the court deducts the fees associated with failed claims against  
6 Defendant's publisher, co-author, and editor (34 hours X \$250 hourly rate = \$8,500  
7 deduction). The second deduction is for all attorney's fees associated with Plaintiff's  
8 second motion to remand. As stated in the court's January 18, 2007 order denying  
9 remand, Plaintiff brought a motion to remand without any supportable basis and in  
10 contravention of well-settled law. Accordingly, the court deducts \$1,075 from the  
11 award, which represents fees incurred in filing Plaintiff's second motion to remand (4.3  
12 hours X \$250 hourly rate = \$1,075 deduction).  
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14 Finally, the court considers Defendant's request to deduct Mr. Radley's fees for  
15 performing "administrative tasks." The fees charged by Mr. Radley that Defendant  
16 terms "administrative," are related to cite-checking, filing pleadings, and delivering files  
17 to the clerk of court. While these tasks may also be performed by an administrative  
18 assistant, the court is not aware of any requirement that when an attorney performs  
19 these tasks, his charges are not recoverable because they are deemed "administrative."  
20 Mr. Radley's fees associated with these tasks are minimal and reasonable. Defendant  
21 cites no authority for the proposition that an attorney may not charge for time spent  
22 filing documents, electronically or otherwise, and for performing other administrative-  
23 type tasks. Thus, the court will not reduce Plaintiff's attorney's fees request because  
24 the attorney performed some tasks that Defendant considers "administrative."  
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1 **IV. CONCLUSION**

2 For the reasons stated above, the court GRANTS Plaintiff's motion for  
3 attorney's fees and costs (Dkt. # 60) and awards costs in the amount of \$1,133.12 and  
4 fees in the amount of \$38,425.

5 Dated this 5th day of April, 2007.

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9 JAMES L. ROBART  
10 United States District Judge  
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